Office - Supreme Court, U.S.
FILED
JUL 18 1983
ALEXANDER L. STEVAS
CLERK

83-89

In The

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

IN RE: ELMER H. THOMASSEN,
Petitioner.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES, AND THE HONORABLE FRANCIS C. WHELAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES

Jeanene Moenckmeier
COSTANTINOU & MOENCKMEIER, P.C.
8326 Lackland Road
St. Louis, Missouri 63114

Counsel for Petitioner

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT JUDGE HAS MISINTERPRETED THE MEANING OF THIS COURT'S RECENT DECISION IN MORRIS V. SLAPPY WHEN HE INTERPRETED IT TO OVERRULE THE NINTH CIRCUIT CASES AND OTHER CIRCUIT CASES WHICH HOLD THAT A TIMELY SHOWING OF IRRECONCILABLE CONFLICT AND/OR TOTAL BREAK-DOWN OF COMMUNICATIONS BETWEEN COURT-APPOINTED COUNSEL AND DEFENDANT REQUIRES APPOINTMENT OF OTHER COMPETENT COUNSEL TO REPRESENT DEFENDANT.

II. WHETHER IT IS ABUSE OF DISCRETION TO COMPEL DEFENDANT TO BE REPRESENTED BY COURT-APPOINTED COUNSEL FROM THE FEDERAL PUBLIC DEFENDERS OFFICE WHO HAVE NO BACK-GROUND IN TAX LAW WHEN DEFENDANT IS CHARGED WITH TAX EVASION AND WHEN ATTORNEYS ON THE INDIGENT PANEL FOR THE DISTRICT HAVE A BACKGROUND IN CRIMINAL TAX LAW.

III. WHETHER IT IS ABUSE OF DISCRETION TO COMPEL DEFENDANT TO BE REPRESENTED BY COURT-APPOINTED COUNSEL FROM THE FEDERAL PUBLIC DEFENDERS OFFICE WITH WHOM DEFENDANT HAS BECOME EMBROILED IN IRRECONCILABLE CONFLICT AND WHERE THERE IS A TOTAL BREAK-DOWN OF COMMUNICATIONS BETWEEN DEFENDANT AND THE COURT-APPOINTED COUNSEL.

IV. WHETHER IT IS AN ABUSE OF DISCRETION TO COMPEL DEFENDANT TO BE REP-RESENTED BY COURT-APPOINTED COUNSEL WHO IS NOT EXPERIENCED IN CRIMINAL TAX TRIALS WHEN DEFENDANT TIMELY INDICATES THAT HE HAS NO CONFIDENCE IN THE COMPETENCY OF THE COURT-APPOINTED ATTORNEY AND WHEN DEFENDANT TIMELY REQUESTS THAT THE COURT PAY FOR OR APPOINT AN EXPERIENCED CRIMINAL TAX TRIAL ATTORNEY AT THE GOVERNMENT'S EXPENSE.

INDEX

Questions Presented.....i

Index.....iii

Table of Authorities.....v

Petition for Writ of Mandamus.....1

Opinions Below.....2

Jurisdiction.....3

Primary Constitutional Provisions Involved.....3

Statement of the Case.....4

Reasons for Granting the Writ.....11

I. Writ of Mandamus is the only Adequate Remedy for Petitioner....11

II. Honorable Francis C. Whelan, District Judge, has misinterpreted the meaning of this Court's decision in Morris v. Slappy when he interpreted it to overrule the Ninth Circuit cases and other circuit cases which hold that a timely showing of irreconcilable conflict and/or total breakdown of communications between court-appointed counsel and defendant requires appointment of other competent counsel to represent defendant.....15

III. Petitioner Elmer H. Thomassen is entitled under the Sixth Amendment to competent assistance of counsel and it is an abuse of discretion to require defendant to stand trial with court-appointed counsel who has no experience or educational qualifications in criminal tax law or tax trials, where defendant is charged with tax evasion.....23

Conclusion.....30

Appendix (separate volume)

TABLE OF AUTHORITIES

CASES

Argersinger v. Hamlin, 407 U.S. 25 (1972).....16

Brennan v. Blankenship, 472 F.Supp 149 (D.C.Va.1979).....26

Brown v. Craven, 424 F.2d 1166 (9th Cir. 1976).....16,17

Ellis v. U.S., 356 U.S. 674(1958).....19

Gideon v. Wainwright, 372 U.S. 335 (1963).....16

Johnson v. Zerbst, 304 U.S. 458 (1938).....16

Morris v. Slappy, 103 U.S. 1610 (1983)..... 8,15,20,22

Powell v. Alabama, 287 U.S. 45 (1932).....16

U.S. v. Calabro, 467 F.2d 973 (2d Cir. 1972), cert.den. 410 U.S. 926, reh.den. 411 U.S. 941.....19

U.S. v. Hart, 557 F.2d 162 (8th Cir. 1977).....19

U.S. v. Williams, 594 F.2d 1258 (9th Cir. 1979).....16,17

U.S. v. Young, 482 F.2d 993 (5th Cir. 1973).....19

CONSTITUTION, STATUTES & RULES

Sixth Amendment to the U.S. Constitution..... 3,12,23,28

Fourteenth Amendment to the U.S. Constitution.....4,12,28

26 U.S.C.§7201.....4

28 U.S.C.§1651(a).....3

Rule 6-10 of the Rules of Professional Conduct of the State Bar of California.....27

Rule E C 2-30, Disciplinary Rules, Model Code of professional Responsibility and Code of Judicial Conduct, American Bar Association, as Amended February 1980.....26

MISCELLANEOUS AUTHORITIES

Time Interview of Chief Justice Burger, TIME, Dec. 10, 1973 at 83.....29

PETITION FOR WRIT OF MANDAMUS

The Petitioner/Defendant ELMER H. THOMASSEN, respectfully petitions this Court to issue a Writ of Mandamus to the United States District Court for the Central District of California, and the Honorable Francis C. Whelan, Judge of the United States District Court for the Central District of California, Los Angeles to require them to appoint an experienced criminal tax trial attorney from the indigent panel for the Central District of California to represent Petitioner at the Government's expense; or, in the alternative, appoint a private attorney with experience in criminal tax trials to represent Petitioner at the Government's expense.

Petitioner further requests that the Petition for Writ of Mandamus be expedited because petitioner's trial is set for July 27, 1983.

OPINIONS BELOW

Ninth Circuit. There were no formal opinions rendered in the U.S. Court of Appeals for the Ninth Circuit. The orders entered in the Ninth Circuit are as follows: Order denying Petition for Writ of Mandamus and declaring the Application of Stay pending disposition of Petition as moot. No. 83-7461, entered June 22, 1983 (Appendix to Petition for Writ of Mandamus, hereafter designated: "App.", App. at 22).

District Court. There was no formal opinion rendered in the district court below; however the Transcripts, Docket sheets and Criminal Minutes reflect denials were entered. Transcript of May 18, 1983, App. at 11-13. Transcript of May 31, 1983, App. at 18-19, Criminal Minutes for May 9, 1983, App. at 5, Docket entries for May 9, May 18 and May 31, App. at 29-34. Motion re: Appointment of Experienced Criminal Tax

Trial Attorney denied, May 9, 1983, Reconsideration denied May 31, 1983. Motion for a Continuance denied May 9, 1983. Motion for Relief of Counsel denied May 31, 1983.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.§1651(a) to hear and grant a Petition for Writ of Mandamus where the lower court mistakes the meaning of a Supreme Court decision and misinterprets it. It has authority to control the discretionary acts of the lower court where they are aggravated and apparent and where there are no other adequate means to obtain relief as in the case herein.

PRIMARY CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense.

Constitution of the United States, Amendment XIV:

> Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 6, 1983 petitioner/defendant ELMER H. THOMASSEN was indicted for three counts of Income Tax Evasion, 26 U.S.C.§ 7201, App. at 42.

At the date scheduled for arraignment, April 25, 1983, petitioner indicated he did not understand the forms presented to him and expressed a desire to attempt to obtain private counsel of his choice. Defendant indicated his lack of confidence in the

Federal Public Defender's Office because of their lack of knowledge in tax law and criminal tax trials. The Court below granted defendant two weeks' continuance until May 9, 1983 to obtain counsel. (Docket entry and Criminal Minutes for April 25, 1983, App. 25, and 2-4)

On May 9, 1983 petitioner was arraigned. Petitioner had been unable to obtain private counsel because of the inability to raise the necessary funds. His property is tied up with I.R.S. Tax liens. (Criminal Minutes and Docket entries for 5-9-83, App. at 5-7, 28-31) (See also Declarations at 87-89, 172-176). On 5-9-83 petitioner again expressed his lack of confidence in the abilities of the Federal Public Defender's Office because of their lack of knowledge of tax law and experience in criminal tax trials, and resulting incompetence to try a criminal tax case; and on May 9, 1983 petitioner filed a "Motion for

an Order to Pay for an Experienced Criminal Tax Attorney of Defendant's Choice; or, in the Alternative, Order the Government to Release Property held under Lien." (App. at 82). The motion was denied on 5-9-83. (Crim. Min. and Docket for 5-9-83, App. at 5,31). On 5-9-83 petitioner also filed a motion for a continuance (App. at 98) to obtain [competent] assistance of counsel. That motion was also denied on the same date. (Crim.Min. and Docket for 5-9-83, App. at 5, 29). Petitioner was appointed a Deputy Federal Public Defender under protest. (Crim.Min. and Docket for 5-9-83, App. at 6,29).

Prior to being appointed a Deputy Federal Public Defender petitioner filed several motions in propria persona (Docket, App. at 28-29). The motions were summarily denied on 5-9-83. (Crim.Min. and Docket for 5-9-83, App. 6,29-31). These motions were rescheduled for reconsideration on

5-31-83; however, because Hon. Francis C. Whelan refused to permit petitioner to speak to his pro se motions and Deputy Federal Defender refused to argue the pro se motions, they were not argued on 5-31-83 and thus denied on 5-31-83 (Tr. of 5-31-83, App. at 15-19)

At the proceeding in Court on May 18, 1983, the Court ordered that petitioner would not be allowed to speak in court again, because he was represented by counsel. (Referred to in Tr. of 5-31-83, App. at 17). Also on 5-18-83 the Court ordered defendant to "Quit filing papers. I am going to instruct the clerk if you are not going to represent yourself to quit accepting motions from you." (Tr. of 5-18-83, App. at 13)

On 5-18-83 Deputy Federal Defender Yolanda Gomez moved the Court for relief to withdraw as counsel for petitioner. She indicated the grounds were irreconcilable

conflicts , a total breakdown of communication and that she was not competent to try a criminal tax case. (Motion, App. at 105, Tr. of 5-18-83, App. at 11-13) She suggested that the Court appoint an attorney from the indigent panel since the panel had attorneys who were familiar with tax law and had a background in it. The motion was denied but Ms. Gomez was permitted to withdraw on other grounds (Crim.Min. and Docket, App. at 9,34) At the hearing on 5-18-83 Hon. Judge Francis C. Whelan indicated that the U.S. Supreme Court's recent decision Morris v. Slappy 103 U.S. 1610 (1983) was controlling regardless of the Ninth Circuit cases holding that a timely showing of irreconcilable conflict or breakdown of communications was grounds for appointment of other counsel (App. at 12-13). Another Deputy Federal Public Defender was appointed, Brian Q. Robbins, under protest.

The court appointed Deputy Federal Public

Defenders have refused to file motions for petitioner to protect his rights (See Letters to Yolanda Gomez and Brian Q. Robbins, App. at 135-158); they have refused to argue motions for him (Tr. of 5-31-83, App. at 15-17); they have refused to let him know prior to hearings that they received responses to petitioner's pro se motions (motions filed prior to appointment of Federal Public Defender, but scheduled after appointment) (See Declaration, App. at 181-184, para. k-m.). There has been a total breakdown of communications and irreconcilable conflict between the Federal Public Defender's Office and petitioner, leaving petitioner with no representation at all.

Petitioner requested Deputy Federal Public Defender Brian Q. Robbins in writing to file for a stay and writ in Court to protect defendant's rights to effective assistance of Counsel but he has refused to

do so. (See Letter, App. at 150). Petitioner has also asked Brian Q. Robbins and Federal Public Defender James Dunn orally in person to file said papers in District Court and the Ninth Circuit, but they refused (See Declaration at169-170, para. c.) Petitioner has requested Deputy Federal Public Defender Brian Q. Robbins to make a motion to withdraw; but he refuses to do so, except for a weak oral motion. Declaration of Elmer H. Thomassen in Support of Application for Stay Pending Disposition of Petition for Writ of Mandamus in the Ninth Circuit (App. at 168-192) relates further details of the total breakdown of communications and irreconcilable conflicts between petitioner and the Deputy Federal Public Defenders.

Petitioner filed a Petition for Writ of Mandamus in the Ninth Circuit on June 22, 1983 (Petition at App. at 46); however,

the Ninth Circuit held that there was no clear abuse of discretion and therefore denied the Petition on June 24, 1983 (App. at 22).

REASONS FOR GRANTING THE WRIT

I
WRIT OF MANDAMUS IS THE ONLY ADEQUATE REMEDY FOR PETITIONER

A Writ of Mandamus is the only adequate remedy for petitioner/defendant Elmer H. Thomassen because petitioner is prohibited by the court below from lodging or filing any papers or pleadings and petitioner's court appointed attorney has refused to filed for relief in the court below, and the Court has ordered petitioner to stop lodging or filing papers below (Tr. of 5-18-83, App. at 13). The court-appointed attorneys have not responded to petitioner's letters requesting them to file motions and/or writs (Letters, App. at 135-158)

Further, petitioner has no other

adequate remedy because the Order below denying appointment of an experienced criminal tax trial attorney is not appealable and the Ninth Circuit has denied defendant's Petition for Writ of Mandamus.

The court-appointed attorneys for petitioner have filed no-pretrial motions to assist petitioner and unless this Court intervenes to assist petitioner, the trial will proceed on schedule on July 27, 1983 without any effective assistance of counsel at all and the trial will be a total sham and mockery of justice. 28 U.S.C.§1651 envisions just such a circumstance as the case herein to aid a petitioner with extraordinary aid to prevent an injustice and violation of Sixth Amendment and Fourteenth Amendment rights in the Court below.

Unless this Court grants a Writ of Mandamus ordering the District Court below to appoint defendant below competent counsel, petitioner's due process rights to

adequate representation by counsel guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution will be violated and the defendant will be forced to go through the ordeal of a lengthy and costly trial without effective or adequate or competent representation. An appeal at the end of the trial would not be adequate when the court knows in advance that defendant is not being adequately represented.

Proceeding with trial of the defendant on July 27, 1983 without providing petitioner with adequate assistance of counsel will cause the court to incur judicial waste of the court's time and the taxpayer's money. In addition, it will cause a waste of the defendant's time and money also, because it will take him away from his medical practice which is already suffering during his pending bankruptcy proceedings before the Bankruptcy Court for the Central District of California in

Santa Ana, and it will cause him to lose patients and money unncessarily because of the need for a second trial at the conclustion of the first trial.

In considering whether to grant the Writ of Mandamus, to require the District Court to appoint other counsel as requested by petitioner, the Court must balance the right to adequate representation by counsel and the general interest of the public in prompt and efficient administration of justice, which might be prejudiced by any delay caused by such a Writ. In the case at hand, where the violation of petitioner's due process rights are so aggravated and blatant, this Court should grant the Writ of Mandamus to supervise the District Court below relative to petitioner's right to effective assistance of counsel.

There can be no prejudice to the general public where the government has waited between 4 and 6 years to prosecute the case

herein (See Indictment, Counts I through III, App. at 42-45)

II

HONORABLE FRANCIS C. WHELAN, DISTRICT JUDGE, HAS MISINTERPRETED THE MEANING OF THIS COURT'S DECISION IN MORRIS V. SLAPPY WHEN HE INTERPRETED IT TO OVERRULE THE NINTH CIRCUIT CASES AND OTHER CIRCUIT COURT CASES WHICH HOLD THAT A TIMELY SHOWING OF IRRECONCILABLE CONFLICT AND/OR TOTAL BREAKDOWN OF COMMUNICATIONS BETWEEN COURT-APPOINTED COUNSEL AND DEFENDANT REQUIRES APPOINTMENT OF OTHER COMPETENT COUNSEL TO REPRESENT DEFENDANT

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." A series of Supreme Court decisions over the last 50 years have established that under the Sixth and Fourteenth Amendments a defendant in a state or federal court must be afforded the right to the assistance of

counsel, either retained or appointed, before he can be validly convicted and imprisioned. Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

On the issue of whether it is an abuse of discretion to compel one charged with a serious crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict and where there is a total breakdown of communication between the court-appointed attorney and defendant, and whether it is an abuse of discretion not to appoint another competent attorney, Brown v. Craven 424 F.2d 1166 (9th Cir. 1976) is controlling in the Ninth Circuit. U.S. v. Williams 594 F.2d 1258 (9th Cir. 1979) considered Brown v. Craven, supra as controlling and held that on similar facts, it was error

to deny substitution of court-appointed counsel where a motion was made more than a month before trial for substitution of counsel because of the total incompatibility between defendant and his appointed counsel. In Brown v. Craven, supra the defendant chose to keep his court appointed attorney rather than be forced to appear pro se and in U.S. v. Williams, supra the defendant chose to represent himself pro se rather than to continue to be represented by his court-appointed attorney. In both cases the defendant was convicted and his defense was a disaster.

In the case at hand, petitioner, Elmer H. Thomassen has become embroiled in irreconcilable conflicts with his court appointed attorney Brian Q. Robbins and his predecessor Yolanda Gomez who are Deputy Federal Public Defenders and who were appointed by Hon. Francis C. Whelan below and there is a total breakdown of communi-

cations between pretition and his attorneys. Counsel Gomez was relieved as court-appointed attorney for defendant because of a time conflict prohibiting her from preparing for the trial.

Petitioner Elmer H. Thomassen made a motion for a continuance to obtain [competent] assistance of counsel seven (now eleven) weeks prior to trial on May 9, 1983 and made his motion for an experienced criminal tax attorney paid for by the government also on May 9, 1983, seven weeks prior to trial, which was adequate time for the court to consider and grant such a motion, without affecting the fair administration of justice or the court's trial schedule.

If the Court does not provide petitioner with an attorney with experience in criminal tax trials, petitioner's trial will be a sham and a mockery of justice and petitioner will be denied effective

assistance of counsel. Petitioner does not have a court-appointed attorney who is acting as an advocate. On the contrary, his public defender is doing everything in his power to prevent him from exercising his constitutional right to a fair trial. The Sixth Amendment guarantees the indigent defendant that he be given a court appointed counsel who functions as an advocate, as opposed to that of amicus curiae. Ellis v. U.S., 356 U.S. 674 (1958)

Other circuits have also held that where the defendant makes a showing of irreconcilable conflict or total breakdown of communications, the defendant is entitled to other appointed counsel: U.S. v. Hart, 557 F.2d 162 (8th Cir.[Mo.] 1977); U.S. v. Young, 482 F.2d 993 (5th Cir.[Miss.]1973); U.S. v. Calabro, 467 F.2d 973 (2d Cir.[N.Y.]1972), cert. den. 410 U.S.926, reh.den. 411 U.S. 941.

In denying petitioner's motion for a continuance and for appointment of an experienced criminal tax trial attorney at the government's expense, where lack of competence, irreconcilable conflict and total breakdown of communications were alleged, the court below cited Morris v. Slappy as controlling and indicated that the decision overruled the above cited cases of the Ninth Circuit. The District Court below misinterpreted Morris v. Slappy, supra. Morris v. Slappy is not controlling in the case herein.

When the Supreme Court of the United States recently held in Morris v. Slappy, supra that the defendant is not entitled to a "meaningful relationship" with his attorney, it did not overrule the cases cited above. The case at hand can be distinguished from Morris v. Slappy, supra as follows:

In the case at hand the petitioner is not asking for a "meaningful relationship" with his attorney but he is asking for a competent attorney to give him effective assistance of counsel and a meaningful trial which is not a sham or mockery. Petitioner's attorneys have done nothing to assist him in preparation for his trial and in fact have even refused to file motions, refused to argue motions that were filed prior to their entry of appearance, refused to communicate with petitioner, and refused to inform petitioner of responses to motions which petitioner made while he was still pro se.

Petitioner has no confidence in his court appointed Deputy Federal Public Defenders because of their lack of background or experience in criminal tax trials, and he is unable to communicate with them to prepare his defense. Petitioner made timely motions for a continuance to obtain

[competent] assistance of counsel (App. at 98) and a timely "Motion for an Order to Pay for an Experienced Criminal Tax Attorney of Defendant's Choice; or, in the Alternative, Order the Government to Release Property held under lien." (App. at 82)

In Morris v. Slappy, supra, the defendant asked for a continuance only a few days before trial and only in order to give his newly court-appointed attorney time to prepare. However, his attorney indicated he was prepared. He was not dissatisfied with his attorney at that time. In Morris v. Slappy, supra it wasn't until the Third Day of trial that denfendant indicated any dissatisfaction with his attorney, which was too late to ask for a replacement. In the case at hand, the defendant filed his motions for a continuance and for another attorney seven (now eleven) weeks prior to trial.

In the instant case petitioner's court-appointed attorneys have done nothing to further defendant's defense at trial and are totally ineffective as counsel in the preparation of his case and not competent to handle his criminal tax case. They haven't filed even one pre-trial discovery motion and are acting as petitioner's adversary.

III

PETITIONER ELMER H. THOMASSEN IS ENTITLED UNDER THE SIXTH AMENDMENT TO COMPETENT ASSISTANCE OF COUNSEL AND IT IS AN ABUSE OF DISCRETION TO REQUIRE DEFENDANT TO STAND TRIAL WITH COURT-APPOINTED COUNSEL WHO HAS NO EXPERIENCE OR EDUCATIONAL QUALIFICATIONS IN CRIMINAL TAX LAW OR TAX TRIALS, WHERE DEFENDANT IS CHARGED WITH TAX EVASION

From the very beginning of the case below, at the arraignment petitioner indidated his dissatisfaction with representa-

tion by the Federal Public Defender's Office because of their lack of knowledge in tax law and criminal tax trial experience. Petitioner has attempted to obtain an experienced criminal tax attorney on his own; however, because of lack of sufficient funds he was unable to do so; and he has requested that the court appoint him an attorney with experience in criminal tax trials. (Motions, App. at 82 and 98, Declaration, App. at 87-88 and 101-103)

Petitioner's court-appointed Deputy Federal Public Defender Yolanda Gomez made a motion to the court six weeks (now 10 weeks) before trial to be permitted to be relieved as counsel for petitioner and because of her lack of familiarity with tax law and tax trials and because of irreconcilable conflicts with the defendant. (App. 105) In her motions she suggested to the court that it appoint an attorney for the petitioner from the indigent panel since

there are attorneys on that panel who are familiar with tax law and have a background in it. (Motion, App. at 113) The motion was denied; although Ms. Gomez was relieved as counsel for petitioner for other reasons. (Docket, App. at 33-34)

Tax law is a highly specialized field of law which has become recognized by the State Bar of California as one of the specialized areas which requires additional education after law school in order for an attorney to hold himself out to the public as proficient in the field of tax law. None of the deputy public defenders at the Federal Public Defender's Office in Los Angeles have such a specialization; nor do any of them have a background or experience in tax law which would qualify them as competent to represent petitioner Elmer H. Thomassen in his tax trial herein.

In evaluating the competency of the attorneys of the Federal Public Defender's

Office in their ability to handle a highly specialized area as a criminal tax trial, the court should consider the suggestion of the Court in Brennan v. Blankenship, 472 F.Supp 149 (D.C.Va. 1979) aff. 624 F.2d 1092. There the Court indicated that in attempting to make a relevant evaluation of whether representation by an attorney was competent the court may determine the normal level of competence by reference to such sources as case precedent, state bar canons, American Bar Association Standards and in some instances expert testimony.

Permitting a Deputy Federal Public Defender to represent petitioner Elmer H. Thomassen in a criminal tax trial when the court knows he is not competent in the area of criminal tax trials is a violation of American Bar Association Code, E C 2-30:

FAILING TO ACT COMPETENTLY

(A) A lawyer shall not:
(1) Handle a legal matter which

he knows or should know
is not competent to handle.

Disciplinary Rules, Model Code of Professional Responsibility and Code of Judicial Conduct, American Bar Association, as Amended February 1980.

It is further a violation of Rule 6-101 (1) of the Rules of Professional Conduct of the State Bar of California, which states as follows:

> Rule 6-101. Failing to Act Competently.
> A member of the State Bar shall not wilfully or habitually
> (1) Perform legal services for a client or clients if he knows or reasonably should know that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances unless he associates or, where appropriate, professionally consults another lawyer who he reasonably believes does possess the requisite learning and skill;

The attorneys who represent indigents or defendants who are unable to raise the

the funds for their representation should be required to meet the same standards of professional conduct as other attorneys in the State of California and the United States. The standards of professional conduct have been instituted in order to protect the public, including the petitioner. For the court to appoint an attorney who does not meet the standard above required by the State Bar is to provide a defendant with incompetent counsel in violation of the Sixth Amendment and Fourteenth Amendment to the U.S. Constitution. None of the attorneys employed by the Federal Public Defender's Office, including Deputy Federal Public Defender Brian Q. Robbins, is competent to try defendant's criminal tax case because of their lack of tax knowledge and lack of experience in criminal tax trials.

The Court should consider in evaluating the competency of the attorneys of the

Federal Public Defender's Office in Los Angeles in their ability to handle a highly specialized area as criminal tax trial, the conclusion of Chief Justice Burger that as many as one-half of all attorneys appearing in court are incompetent professionally. He would require special training of an attorney before he could become a trial advocate. TIME, Dec. 10, 1973, at 83.

If a trial advocate, in general, needs additional training to appear in court, then a trial advocate who tries a case in such a specialized area as criminal tax law, with no specialized tax training, is even more incompetent if he represents a defendant in such a trial. Ms. Gomez of the Federal Public Defender's by her own admission, indicated that the Federal Public Defenders had no one on their staff with a background in tax law (Motion (App. at 113), but that there were attorneys

on the indigent panel who have a background in tax law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court issue a Writ of Mandamus to the U.S. District Court for the Central District of California, and the Hon. Francis C. Whelan, District Court Judge, to require them to appoint at the government's expense, an experienced criminal tax trial attorney from the indigent panel for the Central District of California to represent Petitioner; or, in the alternative, to appoint a private attorney with experience in criminal tax trials to represent Petitioner at the government's expense.

July 13, 1983

Respectfully submitted,

Jeanene Moenckmeier
COSTANTINOU & MOENCKMEIER P.C.
8326 Lackland Road
St. Louis, Missouri 63114
(314) 428-8448